UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED MEYER, INC.,

Employer

and

Case 36-RD-1724

LORI GAITHER, an Individual,

Petitioner

and

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 555,

Union

UNION'S ANSWERING BRIEF IN RESPONSE TO EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS AND RECOMMENDATION

The Union provides the following in response to the Employer's brief in support of its Exceptions to the Hearing Officer's Report on Objections and Recommendation:

I. The Employer's Claim that the Past Practice Under Article 13.7 of the Contract is for Union Representatives to Merely Let Employees Working in the Store Know They Will be Available in the Lunch Room is False

The Employer claims that Article 13.7 of the contract merely permits Union representatives to walk the store floor to let employees know they will be available in the lunch room. *See e.g.* Employer's Brief in Support of Exceptions, p. 2. This position is contrary to the language in Article 13.7, the parties long-standing past practice, the evidence presented at the hearing, and the Hearing Officer's express findings based on his assessments about the witnesses' credibility.

A. The Contract Expressly Permits "Contact" so Long as it Does Not Interfere With Customer Service or Unreasonably Interrupt Employees Job Performance

The contract provides:

> "**13.7** - Union Visitation - It is the desire of both the Employer and the Union to avoid wherever possible loss of working time by employees covered by this Agreement. Therefore, representatives of the Union, when visiting the store or contacting employees on union business during their working hours, shall first contact the store manager or person in charge of the store. All contact will be handled so as to not interfere with service to customers nor unreasonably interrupt employees with the performance of their duties."

U. Exh. 1, p. 14.

This provision grants the Union the express right to contact employees about union business "**during their working hours**." *Id.* The Employer's attempt to confine contact about Union business to the lunch room while employees are on break disregards this plain language. The parties expressly agreed that representatives of the Union can contact employees about "**Union business**," not merely to tell them they are in the store, during their working hours. *Id.* The parties also expressly agreed that, because talking to employees about Union business on the store floor could potentially interfere with customer service or work performance, the Union will take care to handle that contact in a matter that does not interfere with customer service or "**unreasonably**" interrupt employees with the performance of their duties. *Id.* The last sentence of Article 13.7 would make no sense if all substantive conversation were to happen in the lunch room, where employees do not perform duties or service customers.

The plain language of this provision recognizes that the Union can talk to employees about Union business on the store floor, even though customers may be present and even though there may be some minor interruption in the performance of duties. So long as the Union does not interfere with customer service or unreasonably interrupt employees performing their job

duties, the Union has the express right to converse with employees on the store floor or wherever they are working.

B. The Testimony at the Hearing Supported the Hearing Officer's Finding That the Longstanding Practice Under this Provision was That the Union Could Speak to Employees About Union Business While They Were Working on the Store Floor

The parties' past practice under Article 13.7 has been consistent with the plain language; representatives of the Union have long been free to talk to employees about Union business during their work hours, wherever they are working, so long as they do not interfere with customer service or unreasonably interrupt employees in the performance of their job duties.

Kay Nelson, who has been the primary Union representative servicing the Coos Bay Fred Meyer store since May 2000, testified:

> Q. Do you sometimes get engaged in conversations with employees about substantive work-related issues while you're on the floor?
>
> A. Yes, I do.
>
> Q: You heard counsel's opening statement. She represented that you just say, Hello, how are you, see you in the break room. Is that the extent of your discussions with employees on the floor?
>
> A: No, no.
>
> Q: Why don't you give us some examples of the types of things you might talk about.
>
> A: I've engaged in conversations with numerous employees at this location about the pension problem that we were having this last year and how it would affect them and that we were going to be having meetings. Anything coming up, unusual with them, I would stop and talk with them, ask them if they had any questions, remind them to attend the meetings, engage in conversations about their personal life, what they are doing, what's going on in their lives. I mean, normal conversations.

> And it's historically been that we have been able to do that with the members at the store location as long as we don't interrupt them – I mean, the customers are still serviced and they continue to work.

Tr. 45-46. Prior to the matters giving rise to the Union's objections in this case, with the exception of the one issue regarding her access to employees in the stock room, Nelson had never, in her nine-plus years, been restricted in any fashion from approaching employees on the store floor. Tr. 47.[1]

On cross-examination, the Employer's counsel attempted to imply that talking with employees must necessarily interfere with employees' job performance, but Nelson explained clearly how she respects that aspect of her visitation rights:

> A. Well, I monitor what's going on and I view – I try and watch, and if customers are coming and they have to help the customer or – I was an employee also, so I know that they need to continue working and part of their function – if I want to talk to them, I would say go ahead and continue working. We can discuss this while you're working. And I think historically we all do that.
>
> Q: What do you mean historically?
>
> A: I would assume – I know that when I was trained as a union representative by another representative that that is how she trained me. You can go out and talk to them. Just make sure that they continue work and that you don't engage in a long lengthy conversation that interrupts their job function or customer service.

Tr. 54-55. On redirect, Nelson explained further that, while she talks with them on the floor, employees can continue to perform duties such as hanging or folding apparel stock, moving or putting product on shelves, stocking produce, or waiting at an empty check stand for customers. Tr. 60. No Fred Meyer manager or supervisor has ever put a time limit on her conversations with

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[1]Nelson had been told one time that she could not talk to employees in the stock room because of safety concerns, but when Nelson protested and the Store Director checked with her superiors, Nelson was granted access. Tr. 48-49.

employees on the store floor. Tr. 61. In response to the hearing officer's follow-up questions with Nelson on this issue, she further testified that, depending on what is going on, it can take her as little as 20 minutes or as long as an hour to walk the store floor and talk to employees, and that sometimes she spends "at least seven to ten minutes" with each employee answering their questions. Tr. 67-69.

Thea Dooley, who has been a representative and organizer for Local 555 since February 2000[2], similarly testified that it has always been her understanding that she can talk with employees on the store floor during work hours as long as she is not interrupting customer service and as long as the employees "continue to do whatever work function they're assigned, stocking shelves or whatever." Tr. 157, 163.[3] Again, the Employer's counsel tried on cross-examination, but to no avail, to suggest that talking to employees on the store floor must interfere with their jobs:

> Q. [* * *] How do you avoid interrupting employees in the performance of their duties?
>
> A. Well, an employee generally when they're working on the sales floor would – like in the housewares department, they would be taking a pot out of the box and hanging it on the shelf. They continued to do that while I was talking to them.
>
> Q. Have you ever unreasonably interrupted an employee in the performance of his duties?
>
> A. When I talk to employees on the sales floor I always try to make sure that they continue working.
>
> Q. What happens if a customer approaches?

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[2]She estimated that she has had thousands of store visits in her career. Tr. 181.

[3]There is no dispute that the Article 13.7 Union Visitation language in the Coos Bay contract is similar to language in other Fred Meyer contracts throughout the state. Tr. 163.

A. I step away.

Q. Do you come back afterwards?

A. Yes.

Tr. 175-76. Later, in response to the Petitioner's question, Dooley explained that she would never approach an employee while they are engaged talking to a customer. Tr. 178.

Teresa Holter, who has worked as a Local 555 representative and organizer for approximately 19 years, also testified about the longstanding right to speak with employees on the store floor so long as they do not interfere with customer service or performance of job duties. Tr. 184, 188 ("So if they can continue to do what they're doing then we can visit with them."). The Employer's counsel tried a slightly different tact with her, but still elicited only confirmation that the Union's representatives honor the contract language:

> Q. You testified that you would limit your conversations with employees so that you're not interfering with them doing their duties. If an employee told you that you were interfering with their duties, would you leave that employee alone?
>
> A. Yes.

Tr. 197.

Likewise, unit member and Union steward Amber Whitney testified that, prior to July 2009, she talked with Union representatives during work hours on the store floor about issues that she has had as a steward. Tr. 108. Her ability to do so, however, changed on July 23, 2009 when she was told by a Human Resources representative and the Photo-Electronics Manager, who was also the Manager on Duty that day, that she could not talk with the Union representatives on the store floor. Tr. 108-112. There was no time or content-based qualification

to this directive; Whitney was directed broadly not to talk with Union representatives on the floor. Tr. 112.

This testimony from several witnesses evidences a longstanding practice, consistent with the express language of the contract, of granting representatives of the Union access to speak with employees about Union business, during working hours, on the sales floor so long as they do not interfere with customer service or interrupt the employees in their performance of their job duties. The Employer offered no evidence of this access ever being restricted prior to the decertification petition being filed in this case. No witness claimed that Union representatives had *ever* been told, prior to this decertification petition, that they had to limit the time the spoke with employees while working. And nobody claimed that, prior to July 2009, any Fred Meyer manager or supervisor had ever told any Union representative that all they could do on the floor was announce their presence and inform employees they were available in the break or lunch room. Fred Meyer offered neither testimony nor any written directive, letter, policy, notice or other document that says anything like that.

Rather, the Employer bases its claim that the practice has been for Union representatives to merely let the employees know they will be available in the lunch room solely on the testimony of Cynthia Thornton and Leslie Gatlin-Smith. A closer look at the testimony of those two Employer witnesses, however, reveals that they equivocated on this point.

First, Thornton testified that she doesn't have any personal knowledge as to what any particular store's practice was with respect to Union representatives visitation; she merely assumes they follow the contract. Tr. 263. Her testimony therefore has nothing to do with past practice, but is rather only her subjective interpretation of the contract language. Even if her

testimony did deserve any weight on this point, she clearly stumbled when pressed on cross-examination about just what the contract provides:

> Q. Now, you said you had a conversation with the store director Leslie Smith regarding some problems with there being too many union reps there or too often?
>
> A. It has something to do with union reps and interfering with work on the floor.
>
> Q. And you told her that union reps are entitled to announce themselves to employees and give them their card and then talk to them somewhere else at a different time?
>
> A. Basically, yes.
>
> [* * *]
>
> Q. BY MS. JOFFE: You told the store director in this instance that the union rep is not to have any conversation with the associates on the store floor?
>
> A. That isn't what I said.
>
> Q. Beyond announcing themselves and giving a card and saying we'll be somewhere else later?
>
> A. Correct.
>
> Q. So, is it your testimony that Union organizers should not have been talking to employees about the substance of the decertification effort while the employees were on the store floor?
>
> A. They were not to interfere with their work.
>
> Q. My question was, is it your position that the Union organizers were not supposed to be talking to employees on the store floor about the content of the decertification petition?
>
> A. And I answered your question.
>
> Q. You said they weren't to interfere with their work?
>
> A. That's my answer.

Q. The substance of the conversation. So they could talk to employees on the store floor about the substance of the conversation as long as they didn't interfere with the employee's work, right?

A. That's what I said.

Q. Did you explain that nuance to the store director or just say they're not to talk to employees on the store floor?

A. I guess you could read back my answer what I told her.

HEARING OFFICER FAWLEY: Well, why don't you just tell us again exactly what you recall telling the store director.

A. Well, we had more than one conversation because we had the conversation with Kay there as well. I don't know which conversation you're talking about. Do you have one in mind?

Q. BY MS. JOFFE: I was talking about the one you testified about. Why don't you clarify which conversation that was?

A. I told the director if you were having problems that you read to them or go to the Union contract and the Union contract explains what they can do.

And that is, that they're to announce to you when they're there. And that they can observe the people work. And that they can let people know that they are there. That they are not to interfere with their work or interfere with service to a customer.

Tr. 255-56, 257-59.

Likewise, while Gatlin-Smith testified on direct that representatives of the Union could merely announce their presence to employees on the floor and then meet them later in the break room, she admitted on cross-examination that she had been previously told by her superiors that Kay Nelson was allowed to talk with employees working in the stock room, even though they were on duty, performing work. Tr. 282-83. She also acknowledged that, on August 31, 2009, she observed Kay Nelson in the store in the service deli talking to associates, even though it was

such a busy day that Gatlin-Smith herself was helping out in the deli. Tr. 289-90. She even went on to admit that:

> "... she's there to talk to associates about union business. I don't question Kay a lot about what she's doing in the store. We have good rapport and I trust her. If she's there, she's there to talk to associates for good reason."

Tr. 289. So it appears that, at least with Gatlin-Smith, it is more about whether she has good rapport with the particular representative of the Union, not whether there is actually any conversation occurred that interferes with customer service or interrupts employees' performance of job duties.

The Hearing Officer correctly concluded that the testimony of Thornton and Gatlin-Smith was insufficient to undermine Nelson's testimony because Thornton conceded she did not have any personal knowledge of any past practice at the Coos Bay store regarding Union access and visitation and because Gatlin-Smith's knowledge of Union visitation comes through her managers, none of whom testified, and she never received any reports of problems about Nelson from them. Report and Recommendation, p. 12.

II. The Evidence Supports the Hearing Officer's Conclusion that the Employer Unilaterally Change this Past Practice Regarding Union Access

The parties do not dispute that in late July 2009, in the midst of the decertification effort, Gatlin-Smith contacted Thornton for some direction about Union access. Nor do they dispute that Thornton told Gatlin-Smith that the Union's representatives could only walk the store floor to tell employees they were there and then meet with employees in the lunch room. They also agree that Gatlin-Smith communicated this direction to her managers and to Union organizers Dooley and Holter. They parties further agree that at least one manager and one Human

Resources coordinator or manager communicated this restriction to employee and Union steward Amber Whitney. As such, there is no dispute that the directive from Thornton to Gatlin-Smith that was passed on to both employees and the Union's organizers was that they could not have any substantive discussions with employees on the store floor. The evidence outlined above clearly demonstrates that this was a significant change from the past practice under Article 13.7.

The Employer claims that it was the Union, not the Employer, that changed things because, following the decertification petition, the Union sent in organizers to visit the store far more than Nelson, the regular servicing representative, regularly visited the store. This argument that "Union Organizers descended on the Coos Bay store" and ran an "aggressive campaign" should be rejected. Employer's Brief in Support of Exceptions, p. 6.

There is nothing in the Article 13.7 Union Visitation language that addresses the number of representatives, their job titles, the type of "Union business" they can discuss, or the amount of time they can visit the store. The Union has the right to talk with employees about Union business during work hours with only two conditions: that they do not interfere with service to customers or unreasonably interrupt employees with the performance of their duties. Not one witness testified that these conditions were violated. There was absolutely no evidence to contradict the testimony of Dooley and Holter that they honored those conditions.

It is not surprising then that the Employer embellished the facts to bolster its weak claim that somehow it was the Union, not the Employer, that changed the practice. The Employer claimed that "the Union Organizers were there all day long, every day for weeks at a time." Employer's Brief in Support of Exceptions, p. 6. This is contrary to the evidence. Dooley first came down to work on the campaign from July 13-16, 2009. Tr. 159. Dooley confined herself mostly to the break room during that time because she had a sprained ankle and could not walk

the floor easily. Tr. 160. It is absurd to suggest that Dooley did anything to offend the Employer's position on access that week because she was holed up in the break room where they wanted her.

Holter joined Dooley in Coos Bay around 4:00 or 4:30 p.m. on July 15 and stayed through mid-day July 18. Tr. 185-86. Both Dooley and Holter came back down to Coos Bay on July 20 and stayed through July 24. Tr. 162, 187. Dooley and Holter spent much of their time contacting employees at their homes, and went back to the store for three separate store visits in between the home visits (presumably to catch employees on different shifts). Tr. 164, 174. Some of those visits were as short as a half hour. Tr. 174.

The Employer's restriction on access began with the Amber Whitney incident on July 23. But both Dooley and Holter went home July 24 and did not come to Coos Bay again until July 27, the day they encountered access difficulties with the Photo-Electronic Manager, and it was the following day, July 28 that Gatlin-Smith told them they could not have conversations with employees on the floor. Tr. 189-92. The Employer's claim that it was the organizers being there "all day long, every day for weeks at a time" is pure prevarication and was obviously not the true motivating factor behind the Employer's crack-down on access.

The Employer also distorts the facts by claiming that the organizers "stayed out on the sales floor all day long, following employees around and speaking to them for as long as the Organizer wished to do so." Employer's Brief in Support of Exceptions, p. 7. There is no credible evidence whatsoever to support this gross embellishment. The Hearing Officer correctly gave no weight to the unverified double-hearsay claim that there was supposedly a complaint from <u>one</u> employee. Report and Recommendation, p. 13. Gaitlin-Smith supposedly heard about this complaint from a manager, but she never bothered to talk to the employee who allegedly

complained. Neither the employee who allegedly complained nor the manager to whom she supposedly complained testified at the hearing. The entire "employee complaint" claim was thin at best, pure fantasy at worst. Nor was there any evidence about how long Dooley and Holter spent talking to individual employees. The Employer's claim that their conversations were "lengthier" than Kay Nelson's have been over the years is completely unsupported by the evidence.

The Employer's argument that the change in the *content* of the organizers' discussions with unit members, namely whether they should decertify the Union, supports the Union's position here, not the Employer's. That the Union was talking to employees during this time about the decertification effort rather than about grievances or pension and health and welfare questions is none of the Employer's business. Article 13.7 grants the Union access to employees to discuss "Union business," without qualification. This portion of the Employer's argument merely underscores that its motivation for cracking down and restricting Union access was to influence the election:

> "The Organizers [were] there for only one reason: to respond to the decertification petition. The Employer simply responded to the Union's change in practice..."

Employer's Brief in Support of Exceptions, p. 9.

III. The Hearing Officer Correctly Concluded that The Employer's Restriction on Access Was Sufficient Grounds to Set Aside the Election

The Employer's conduct warrants setting aside the election because it impaired the Union's access to the bargaining unit in a very close election, and the Union need only show that the Employer's conduct *possibly* affected the outcome.

The Employer faces a heavy burden in arguing that its unfair labor practice does not warrant setting aside the election:

> "It is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election. The only exception to this policy is where the misconduct is *de minimis*: such that it is virtually impossible to conclude that the election outcome has been affected."

American Red Cross Missouri-Illinois Blood Services Region, 347 NLRB 347, 354 (2006) (internal quotations, citations and footnotes omitted); *see also Clark Equipment Co.*, 278 NLRB 498, 505 (1986), *overruled on other grounds*, *Nickles Bakery of Indiana, Inc.*, 296 NLRB 927 (1989); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-87 (1962).

In determining whether the Employer's conduct was *de minimis*, the Board considers factors including the nature of the conduct, the number of people affected, and the closeness of the election. *Waste Management, Inc.*, 330 NLRB 634, 635-336 (2000); *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002); *Caron International, Inc.*, 246 NLRB 1120, 1120 (1979). In this case, these factors require setting aside the election.

First, the nature of the Employer's conduct here was such as to affect the election. Most obviously, restricting Union representatives' access to employees necessarily tends to influence the outcome of an election because it "literally interferes, in the words of the statute, with the right/obligation of the Union to communicate with its constituency." *ATC/Vancom of California, L.P.*, 338 NLRB 1166, 1168-69 (2003); *affirmed ATC/Vancom of California v. NLRB*, 370 F3d 692 (7th Cir. 2004); *see also Allied Mechanical Inc.*, 343 NLRB 631, 631-32 (2004), *review denied, United Steelworkers of America v. NLRB*, 483 F3d 1112 (9th Cir. 2007); *Waste*

Management, Inc., 330 NLRB at 635-36. Denial to the Union of access to an important means of communication necessarily affects the outcome of an election. *Id.*

The Employer's claim that denial of access must be total to warrant setting aside an election disregards the Board's case law. Employer's Brief In Support of Exceptions, p. 10.[4] For example, in *Allied Mechanical, Inc.*, the employer removed union literature from one bulletin board, but the union retained access to others. 343 NLRB at 632 n6. The Board held that by removing union literature during the critical period, "the Respondent denied its employees access to *an* important medium of communication during the campaign." *Id.* at 631-32 (emphasis added). Moreover, the Board has recognized the dramatic difference between access to employees on a sales floor and access to a break room. *Ernst Home Centers*, 308 NLRB 848, 848-49 (1992).

The Employer's proposal that denial of access must be total to warrant setting aside an election is entirely inconsistent with the Board's standard that an election will be set aside unless an Unfair Labor Practice is "*de minimis*: such that it is virtually impossible to conclude that the election outcome has been affected." *American Red Cross Missouri*, 347 NLRB at 354.

In addition, the fact that the Employer's actions constituted a unilateral change undermined the Union's status as collective bargaining representative and communicated to employees both the Employer's disregard of its employees' rights and its support of the decertification campaign. *ATC/Vancom of California*, 338 NLRB at 1169.

Finally, the Employer's conduct affected every employee in the bargaining unit in a very close election. "Objections must be carefully scrutinized in close elections." *Robert Orr-Sysco*,

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[4]The Employer's argument that the cases relied upon by the Hearing Officer concerned bulletin boards rather than in-person communication is a distinction without a difference. *Id.*

338 NLRB at 615. The Board considers the number of employees affected by an employer's conduct in the context of the number of votes that could have changed the result of the election. *Id.* Here, a change in only two votes would have changed the result of the election, and the Employer's conduct affected every member of the bargaining unit. Report and Recommendation, p. 14-15.

Contrary to the Employer's suggestion, the Union is not required to show that the Employer's conduct did in fact affect the election, only that such conduct objectively could possibly affect the election. *Red Cross of Missouri*, 347 NLRB at 354; *Hopkins Nursing Care Center*, 309 NLRB 958, 958 (1992) (rejecting argument that threatened employee did not in fact change her position towards union). Nonetheless, the effect of the Employer's conduct in this case is clear from the record.

IV. Conclusion

For the reasons set forth above and in the Union's Exceptions and supporting brief, the Union respectfully requests that the Board sustain both of its objections, set-aside the August 7, 2009 election, and direct that the election be re-run.

DATED at Portland, Oregon, this 30th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **UNION'S ANSWERING BRIEF IN RESPONSE TO EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS AND RECOMMENDATION** on:

Richard L. Ahearn, Regional Director
NLRB Seattle Regional Office
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by e-Filing a true a correct copy through the e-Gov service of the National Labor Relations Board on October 30, 2009; on:

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by emailing a true and correct copy to the last known email address of Ms. Sabovik on October 30, 2009; and on:

Ms. Lori Gaither, Petitioner
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by sending a true and correct copy via Federal Express (Tracking No. 8684 6342 2157) to Ms. Gaither at the address listed above on October 30, 2009.

DATED this 30th day of October, 2009.

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